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Supreme Court of the United States

October Term, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and THE UNITED STATES OF AMERICA,

Appellees.

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. THE COURT ERRED IN NOT DISMISSING CASH'S PETITION. THE CONDITIONS UNDER WHICH ACQUISITION WAS PERMITTED DO NOT CURE THE ERROR. FOR ALLEN, IN ITS APPEAL FROM REFUSAL OF INTERVENTION, TO SHOW THIS HERE, IS PROPER.

One of the grounds of Cash's motion to dismiss or affirm (printed Statement Opposing Jurisdiction, p. 18) is:

> "4. No substantial question is presented by the appeal. It raises only a moot question."

Cash's statement opposing jurisdiction (id. pp. 14-16) argues:

> "IV. Appeal presents no substantial question. It raises only a moot question."

While Cash now has abandoned this contention, and omits it from its summary of argument (Br. 5) and in the points and argument in the brief, Cash's motion in this Court remains undisposed of by the order of February 7, 1944 (R. 108).

Aside from this, however, if the trial court had dismissed Cash's petition after Allen appealed from the final order refusing leave to intervene, this Court would probably have dismissed Allen's appeal, because Allen would have obtained all the relief which it could have obtained had it been permitted to intervene. It is, therefore, in our view, entirely suitable and perhaps necessary that we argue here, as we have done in our Brief for Appellant: First, acquisition, under the correct meaning of the decree and applicable law, should not have been permitted under any conditions; and only if we are wrong in that; second, that the conditions inserted in the findings and order of December 7, 1943, do not countervail the clear error of allowing acquisition.

In allowing acquisition, the trial court did not follow the applicable decisions of this Court cited in Brief for Appellant, pp. 30-32, and particularly *U. S.* v. *Swift & Co.*, 286 U. S. 106, cited to the trial court and approved as late as *Chrysler Corporation* v. *United States*, 316 U. S. 556, 562 bot. The trial court apparently thought (R. 89, 90), as contended by Cash in that court and still contended by Cash here (Br. pp. 26, 29), the matter was governed by *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291. There was a vigorous dissent in that case by Chief Justice (then Mr. Justice) Stone, concurred in by Justices Holmes and Brandeis. But, aside from that and the query whether that case would be followed now under exactly similar circumstances, the facts here are plainly distinguishable: First, because the competition between Allen-Wales with its combination adding cash register and

Cash with its cash register had just begun and was showing healthy growth; second, because the company acquired by International Shoe Company was in financial difficulties and, in the view of the majority, would have disappeared had it not been bought by International Shoe. This was not at all true of Allen-Wales, which was the largest of the independents (R. 59) and was in a flourishing condition and capable of successful and expanding competition with Cash. Section 7 of the Clayton Act, c. 323, 38 Stat. 730, 731 (U. S. C., Title 15, Sec. 18) forbids a corporation to acquire stock of another corporation

> "where the effect of such acquisition may be to substantially lessen competition"

between the buyer and seller; or

> "tend to create a monopoly of any line of commerce."

This prohibition is not limited, as Cash still insists (Br. p. 26) to present substantial competition between buyer and seller. This sale, if permitted to stand, will result in suppression of future competition between Allen-Wales, Allen and other independents and Cash and in the increase of the size and monopoly of Cash which the record shows still exist. Thus, for example, in 1941, Cash sold 69,000 cash registers (R. 71).

II. THE COURT REFUSED INTERVENTION ON THE GROUND THAT CASH AND THE GOVERNMENT WERE THE ONLY PROPER PARTIES IN CONNECTION WITH A PETITION TO MODIFY THE ANTI-TRUST INJUNCTION DECREE TO WHICH THEY HAD CONSENTED. IT DID NOT RECOGNIZE THE ANCILLARY AND EXCLUSIVE NATURE OF ITS JURISDICTION.

We repeat this was the ground and the sole ground for the refusal (R. 41 bot.). That was the ground on which Cash objected to the intervention. Allen had no right under

Rule 52(a) to require the court to find the facts specially and state separately its conclusions of law thereon, because its motion for leave to intervene was not "an action tried upon the facts." *Thomas et al.* v. *Peyser,* 118 Fed. (2d) 369 (App. D. C.). If the court should have found the facts and law, it should have done so on its own motion, as the rule provides:

> "Requests for findings are not necessary for purposes of review."

Counsel for Allen presented an entry asking the court to embody in it the above ground. The court did not deny that was the ground, or suggest any other, but declined to state in the entry any ground on which it had refused intervention.

The mistake of the court was in not recognizing that the proceeding in which intervention was sought was on a petition to modify a decree entered to protect the class to which Allen belonged, so as to permit acquisition which would be injurious to proposed intervenor both in its personal interests and as representative of that class. Cash's brief here similarly fails to notice the same matter, i. e., that the Court's jurisdiction is ancillary and exclusive.

The basic reason requiring allowance of intervention is that Allen, in these capacities, was protected by the decree; that the decree was broader in its restraints than the Sherman and Clayton Acts and that the only court which could permit acquisition was the court which had, by the decree, sought to be modified forbidden it. No other court could. This is pointed out in *Carbide & Carbon Chemicals Corp.* v. *U. S. Industrial Chemicals, Inc.,* 140 F. (2d) 47, 49, 50 (4 Cir.) (appearing in the advance sheets of March 13, 1944, after our original brief was filed), where it is said:

> "Ordinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it

> without interference from other courts under suits subsequently instituted." (p. 49)

and

> "The New York judge decided the issue thus made against plaintiff and retained jurisdiction. A proper application of the rules of comity required that respect be accorded this adjudication. For the court below to have ignored it, would have led to an unseemly conflict of jurisdiction and would have benefited no one. . . .". (p. 50)

See, also, *C. I. & W. R. R. Co.* v. *I. U. Railway Co. et al.*, 270 U. S. 107, 116-17.

III. THE GROUNDS FOR INTERVENTION WERE SUFFICIENTLY STATED TO THE TRIAL COURT. EVEN HAD THIS NOT BEEN TRUE, THIS COURT, IF THE GROUNDS EXIST, CAN SO DECLARE.

Since Cash argues (Br. 16-17) the grounds for intervention were not sufficiently presented to the court, it seems necessary to supplement or perhaps repeat some of the statements in our brief (pp. 3-8). According to Rule 7 (b)(1), a motion made during a hearing or trial need not be in writing and

> "the requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion"

such as was admittedly given to the Government and Cash by Allen's Exhibit A for identification (R. 29, 55). No extended statement or argument was necessary, since, when the Government made no objection

> "because we feel that the Federal Rule is specifically 24(b)(2), which supports an application to intervene at this time" (R. 29 bot.)

the court immediately granted conditional intervention, examined the proposed answer (R. 30) and called for tentative opening statements. In Allen's opening statement (R. 31), Allen was proceeding to develop what it would expect to show in opposition to the petition. Whereupon the Court asked the theory of claimed right to intervene. To this counsel for Allen gave (R. 32-3), without specifically referring to Rule 24(a), the substance of it by asserting intervention is proper where parties in interest would be affected by the decree, the Government had no objection and felt proposed intervenor's position should be represented and reference to the *Swift* case, *supra*.

Further discussion by Allen of its right to intervene was curtailed by the court then saying to the proposed intervenor that it could cite authorities

> "between tonight and tomorrow—to support your position" (R. 33)

and counsel stated the authorities would be supplied (R. 33). Then counsel for the Government repeated:

> "this is a decree matter and not a case of first impression" (R. 34)

that the application satisfied the procedural requirements as to time and not unduly prejudicing or delaying rights of the parties involved and that the application should be permitted (R. 34).

Later, Allen specifically referred (rather breathlessly as it was allowed just a minute) to "our right to intervene" (R. 35 bot.) and Section 16 of the Clayton Act as making

> "it clear we have the right to intervene."

The court, in the afternoon session on the same day, instead of giving opportunity for citation of authorities as

promised in the morning, without any argument or opportunity to Allen to be heard further, revoked the conditional intervention allowed in the morning and definitely refused intervention (R. 40).

After Allen had been refused intervention, but while the court could still have remedied its error, Government counsel referred to an opinion of Judge Wyzanski in the District Court of Massachusetts in an anti-trust proceeding, saying (R. 86-7):

> "There was a question of intervention. He made this very illuminating statement:
>
> > 'Judges must be willing to hear from more than the conventional parties in an adversary procedure, to receive expert suggestions from specialists and governmental agencies, and accept economic testimony appropriate for laying down a broad rule in industrial government and to find decrees suitable to the character of the many dimensions of the problem revealed.'
>
> That was in connection with an antitrust proceeding similar to this, where the Court is called upon to consider by the decree all the circumstances, any part of the business."

This is *Crosby Steam Gauge, etc. Co.* v. *Manning, et al., Inc.*, 51 F. Supp. 972, 974 (1943), cited and quoted from in our brief opposing motion to dismiss or affirm (p. 17).

Finally, in the statement as to jurisdiction filed with the court December 4, 1943 (printed Jurisdictional Statement pamphlet p. 1), before any order on Cash's petition had been made, the court was apprised fully of Allen's claimed right of intervention.

The trial court was, therefore, pretty well apprised, about as well as conditions permitted, of Allen's reliance on Rule 24(a) as requiring allowance of intervention, and certainly on 24(b) both by Allen and the Government as

permitting it. But, even if this were not so, this Court is not precluded for that reason from ordering that justice should be done and intervention be allowed if it should have been allowed. *Hormel* v. *Helvering*, 312 U. S. 552, cited by opponents (Br. 19), is, contrary to their reliance on it, authority for our assertion, because it was said (pp. 556-7):

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below."

The suggestion in the brief for Cash (p. 19 bot.) that if there had been a clearer assertion of reliance on Rule 24(a) than they think was asserted, their client

> "might well have considered the withdrawal of its opposition to intervention, if there appeared to be any merit in the claim"

and so that they were prejudiced, hardly seems convincing in view of their elaborate and continued insistence that there is actually no right of intervention under Rule 24 or any merit in the claim of Allen or in Allen itself. Cash's objection to Allen's proposed intervention was that it had no standing as an outsider, not specifically included in the decree, to intervene (R. 29 bot.).

IV. THE APPLICATION TO INTERVENE WAS TIMELY. THERE WAS NO UNDUE DELAY OR PREJUDICE.

Cash's brief (pp. 12-13) does not, we think, refute the statements of fact and argument on this point contained in our brief under III (pp. 26-8), although it goes outside the record in an attempt to do so. Contrary to their

apparent argument that Allen knew in advance of the stipulation between the Government and Cash, although it was not filed of record or introduced until after the trial was under way, the record shows that when the chart referred to was offered in evidence (R. 36), Allen stated that so far as it related to that corporation, the chart was incorrect and Allen desired to correct it (R. 36 bot.). This proves it had not been shown to Allen. Also, when the court asked (R. 35 top) if it was conceded Allen-Wales was one of nine manufacturing the same type of machine and whether there would be eight doing the same line of business "if the deal went through," Allen denied that fact. It will be noted (R. 13) that the notice of petition and service of same on the Attorney General were not filed in the District Court until September 24, 1943. There was no order of court of record fixing any certain time for the hearing on the petition. The difficulties of filing a suitable intervening answer without seeing the contract of purchase or knowing of the Government's attitude or what it would admit, were great. Application to intervene was conceded by the Government to be timely; contention to the contrary or proof were not made by Cash before intervention was refused; the court did not, as required by Rule 24(b) consider whether the intervention would unduly delay or prejudice the adjudication of the rights of the original parties and we do not purpose noticing or attempting to refute subsequent statements of Cash's attorneys which are not evidence.

When counsel for appellant stated he had not seen the stipulation and wanted to examine it before it was marked in evidence (R. 35), he was not, as Cash says in its brief (p. 13)

'interjecting himself into the proceedings.'

Allen had then been admitted, though conditionally, and was a party and was given by the court

> "an exception to everything that takes place here" (R. 35).

Only a party may take such exceptions.

V. A REFUSAL OF INTERVENTION IN A MODIFICATION OF ANTI-TRUST DECREE PROCEEDING IS APPEALABLE BY DIRECT APPEAL TO THIS COURT AND NONE OTHER, WHETHER INTERVENTION IS OF RIGHT OR PERMISSIVE WITH DENIAL CONSTITUTING AN ABUSE OF DISCRETION.

Such an appeal was sustained in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, ruled that an appeal to a Circuit Court of Appeals in such case is not permissible. The former case, it is true, differs from this in that the proposed intervenor there was specifically named in the decree, whereas here it is included by operation of law as one of a class to be protected by the decree. This difference, however, does not prevent appeal to this Court from refusal to intervene; in both cases, the refusal of intervention was the final decree of the court as to the respective intervenors, because in both cases the intervenors' rights would be lost if not permitted to intervene. In *Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 458, the opinion refers to the "refinements" of intervention of right and permissive intervention preserved by Rule 24. The question was said to be (p. 458) whether the District Court abused its discretion in allowing intervention. If appeal is permissible from allowance of intervention on the claim of abuse of discretion, an appeal from a refusal of intervention constituting an abuse of discretion is likewise permissible.

In *Carbide & Carbon Chemicals Corp.* v. *U. S. Industrial Chemicals, Inc., supra,* the discretion involved was to grant or refuse declaratory relief. The court said such discretion

> "'is a judicial discretion and must find its basis in good reason' and is subject to appellate review in proper cases."

See, also, *Gargano* v. *United States,* 140 F. (2d) 118 (9 Cir.), holding an order denying defendant's motion to set aside a portion of a judgment sentencing defendant under one count of an indictment was a "final decision" and appealable.

VI. THE COURT'S REFUSAL OF INTERVENTION WAS ERROR REQUIRING REVERSAL.

Allen had a special interest in resisting the petition; shown, for example, by paragraph 20 in its proposed answer (R. 56, 62-63), because of the confusion that would result from the impression that Allen had sold out to Cash.

The suggestion in Cash's brief (p. 23) it was developed in the course of Mr. Allen's testimony that he has a lawsuit pending against one of the stockholders, is incorrect, because that matter had been stated in the last sentence of paragraph 20 of Allen's proposed answer (R. 63). Counsel also assert, without any evidence in support, that Allen's averment in paragraph 5 of the proposed answer (R. 56, 58) that Cash intended to dislocate the Ithaca plant of Allen-Wales is untrue. Allen tendered an issue on that point, and it is not to be presumed it had no evidence in support of its averment merely because Cash's counsel deny it in a brief. On the contrary, VIII (c) of Cash's petition (R. 6, 11) gives as one of the reasons why it desires to acquire the stock of Allen-Wales that thereby it

> "will provide additional employment for men and women in the petitioner's factory in Dayton, Ohio. . . ."

It is somewhat amusing that Cash's counsel suggest Mr. Allen's testimony as a reason why the court may have refused Allen intervention, because Allen's testimony was not given until after conditional intervention had been revoked and intervention had been finally refused. To say that testimony given after the court had refused intervention was the reason for the court's refusal is to ascribe to the court a greater degree of prescience than is possessed by mortals not coming within the classification of prophets.

Mr. Allen's testimony had nothing to do with the refusal. It was given under great disadvantage, without the assistance and protection of his counsel and without proper conference with Government counsel before he was placed on the stand. Much of the cross-examination was completely irrelevant in view of *Securities Commission* v. *U. S. Realty Co., supra.* That case (p. 459) held Rule 24(2)

> "plainly dispenses with any requirement that the intervenor shall have a direct or pecuniary interest in the subject of the litigation."

It was, therefore, proper that in our praecipe for transcript to this Court (R. 25) and in our praecipe for printing in this Court [R. 106 (c)], we did not include any directed omission of Mr. Allen's testimony; and in our view not proper that Cash in its praecipe [R. 28, par. 6, and 107(b)] should have caused this testimony to be included and printed. If it was to be included, the whole of it should have been printed, including the redirect which appears or should appear on page 115 of the typewritten transcript, as follows:

> "Redirect Examination
>
> "By Mr. Moyer:
>
> Q. Mr. Allen, if National Cash Register should sell at cost, or at nearly cost, the Allen-Wales machines that they are acquiring, could you as an independent remain in business? A. No.

Q. You actually are fearful of being put out of business by the National Cash Register Company? A. Absolutely.

Q. Who prepared the petition that you signed? A. Mr. Bruce and I.

Q. Mr. Bruce is your attorney? A. That's right.

Q. Isn't it important to you and the other independent dealers that Allen-Wales' distributors remain in business? A. It certainly is.

Q. Outside of the group of independent dealers you have no choice but to develop your own distribution system by hired employees? A. That's right."

As to the possible inadequacy of the Government's representation of Allen, we have repeatedly stated its conscientiousness, but that it is likewise a possible deduction that when the Government requested Allen be allowed to intervene, it recognized that the opposition to Cash's petition would be more adequate. The Government answer did ask that the petition be dismissed. The Government's inadequate representation as an adversary and assumption of non-adversary attitude first became apparent when the stipulation was introduced in evidence. This stipulation indicated the Government was not going to call witnesses, but rely on letters from Allen-Wales dealers and Cash's answering statements thereto in place of evidence. Especially when the court expressed disapproval, the Government should have called witnesses, since one witness on the stand or in depositions could have given far more informative and persuasive testimony than all of the letters put together. If the court had allowed Allen, as promised, opportunity to present authorities after the close of the first day's session, Allen could then have pointed out that it considered non-adversary representation and letters inadequate representation. As to the suggestion in the brief (p. 23) there was ample opportunity to confer with counsel for the Government before and during the hearing, we

deny that and the difference in non-adversary and adversary attitude would not be conducive to unified resistance.

Cash's brief (p. 12) asserts that the stock of the sellers was never in the custody of the court within Rule 24(a)(3). It was in the constructive custody of the court so far as concerns sale of it to Cash. When Cash applied for leave to buy it, then applicant was

> "so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court. . . ."

Without attempting, in the brief time intervening before argument after receipt of Cash's brief, to dispute all of its arguments in this Court as to why intervention should not have been allowed, we mention that many of these reasons are afterthoughts and not objections presented when intervention was sought. Hence, they should not be noticed here. *United Railways Co.* v. *West,* 280 U. S. 234; *Patrick* v. *Graham,* 132 U. S. 627.

COMMENTS ON GOVERNMENT'S BRIEF

Since sending the above brief to the printer, we have received this Friday, March 24, page proof of brief for the United States and have, therefore, but a few moments for comment on that.

The record references 43 and 93 in the first line of page 8 are incorrect. Actually, the only exhibits offered by the Government were of an inconsequential character, as follows:

NUMBER	
101	Agency Manager's Contract, The National Cash Register Company
103	Photostatic copy letter June 5, 1940, from Allen-Wales Adding Machine Corporation to all Allen-Wales Dealers and Distributors

NUMBER

104 Allen-Wales Catalogue Adding Machines

105 Folder containing photostatic copy of Statements by Dealers of Allen-Wales Adding Machine Corporation

106 Folder marked "Adding Machine Distribution Systems"

107 Statement received from Allen-Wales Adding Machine Corporation stating its annual volume in dollars and units for adding machines, bookkeeping machines and cash drawer machines from January 1, 1933, to May 31, 1943

108 Price List (U. S.) of National Cash Register Company.

We notice that the Government's brief has nothing to say regarding our criticism of the introduction of letters aspersed by the court, instead of testimony.

The Government says (Br. p. 11 top) there is no unconditional right to intervene under Section 16 of the Clayton Act

> "in proceedings by the United States to enforce the anti-trust laws"

or (p. 10 top)

> "in injunctive suits brought by the United States to enforce the provisions of the Sherman Act."

But this proceeding is not such. The intervention is sought where a petition of the offender has been brought seeking to modify the injunction decree in a way that will injure the proposed intervenor, such decree being broader in its protection than the provisions of the Sherman, Clayton or Federal Trade Acts. Since no other court than the court which passed the decree can modify it as the petitioner, Cash, desires, since Section 16 of the Clayton Act does not permit injunctions against executed transactions, since

no other court than the one in which intervention is sought can give proposed intervenor the relief of refusal to modify its decree, and since intervenor will not be able to resort successfully to any other court for protection under the decree after the court which passed it has modified it and retained continuing jurisdiction, Allen is, we assert, entitled to intervention of right.

The cases cited in the note on page 10 do not touch this question and are not opposed to what has just been stated. *Ex parte Tobacco Board of Trade*, 222 U. S. 578, was a petition for mandamus in this Court to permit intervention after decree. The reasons for refusing relief in mandamus under the circumstances of that case, wholly different from ours, make the decision not germane to the issues here. In *United States* v. *Columbia, Etc., Corp.*, 27 F. Supp. 116, there was about three years delay in seeking intervention and the case turned largely on that. Moreover, there the Government opposed intervention, whereas here it consents thereto.

In *United States* v. *Columbia, Etc., Corp.*, 28 F. Supp. 168, it appears, p. 170, there was no claim of intervention of right. The city seeking intervention wished to raise issues wholly outside the scope of the original case, such issues being the proper rates to be charged gas users. That was a ground for refusing intervention. In the same case, 108 F. (2d) 614 (wrongly stated in Government brief as p. 618), the appeal to the Circuit Court of Appeals was dismissed for want of jurisdiction in that court, the holding being that appeal should run, as it has been taken in this case, to this Court.

The Government contended in the court below and still believes (p. 41) appellant should have been allowed to intervene. Without protracting the discussion of the "refinements" of Rule 24 as to intervention of right and permissive intervention, there was an abuse of discretion in

this case. The court granted conditional intervention, promised the intervenor opportunity to cite authorities in support of its position, then revoked the allowance of tentative intervention and, without any apparent reason except a mistaken view of the law, denied intervention. It did not, as required by Rule 24(b), last sentence, if 24(b) was the applicable rule,

> "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Respectfully submitted,

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